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Attorneys for Defendant
KWOK CHEUNG CHOW

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

	No. CR 14-0196 CRB
UNITED STATES OF AMERICA, Plaintiff, vs. KWOK CHEUNG CHOW, Defendant. _____/	NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF PROTECTIVE ORDER AND DENIAL OF DEFENSE REQUEST FOR RECIPROCAL PROTECTIVE ORDER; REQUEST FOR HEARING. Date: August 20, 2014 Time: 2:00 p.m. Hon. Judge Breyer

PLEASE TAKE NOTICE that on the date and at the time indicated above, defendant KWOK CHEUNG CHOW, through counsel, will and hereby does move this court to reconsider the Protective Order and Defense Request for a Reciprocal Protective Order.

This motion is predicated on the files and records in this case, the declaration of counsel and memorandum of points and authorities filed herewith, the exhibits filed herewith, and on any evidence and argument as may be presented on the hearing of this motion.

/s/ CURTIS L. BRIGGS

CURTIS L. BRIGGS
Attorney for Defendant
KWOK CHEUNG CHOW

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, No. CR 14-0196 CRB

Plaintiff,

vs.

KWOK CHEUNG CHOW,

Defendant.

_____/

MOTION FOR RECONSIDERATION OF PROTECTIVE ORDER AND DENIAL OF DEFENSE REQUEST FOR RECIPROCAL PROTECTIVE ORDER; REQUEST FOR HEARING.

Date: August 20, 2014
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INTRODUCTION

Based on new facts which have surfaced subsequent to the issuance of the Protective Order in this matter, Mr. Chow hereby seeks this Court's reconsideration of: (1) the necessity of the blanket Protective Order; and (2) the Reciprocity of the Protective Order.

Specifically, as detailed below, the Government (1) recklessly or intentionally misled this Court regarding the volume of evidence it possessed against Mr. Chow and other co-defendants; thus, assertions that the redaction of the discovery would be a "Herculean Task" justifying a blanket Protective Order were false; (2) the discovery regarding Raymond Chow included both redacted copies and identical copies which were un-redacted, indicating that the Government did have time to redact contrary to their assertions; (3) the burglary at Colour Drop where the Government disseminated the "Subject Material" herein illustrates the necessity to impose, at a minimum, a reciprocal duty on the Government to ensure that safeguards are imposed for the "Subject Material" in this large scale, politically explosive investigation; (4) Chow urges transparency in prosecution and would ask that this Court depart from a course of action designed to protect public persons and public officials whose conduct was suspect throughout this investigation yet they mysteriously remain unindicted.

In any criminal case it is critical not to burden the defense unnecessarily. When it is found that it is necessary to impose security obligations, or restrictions on speech, those obligations must be reciprocal or the net effect is to create an

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unfair playing field where justice suffers.

STATEMENT OF CASE

Mr. Chow was arrested on March 26, 2014, and is charged by way of indictment with ten counts stemming from what the Government characterizes as a five-year investigation into public corruption and organized crime in and around the Bay Area. Seven of the ten counts allege conspiracy to engage in money laundering (Counts 3, 4, 7, 28, 29, 30, and 31).[1] The three remaining counts allege conspiracy to sell either stolen liquor or cigarettes (Counts 6, 8, and 26).[2] According to the Government, the investigation into political corruption is still ongoing and tangentially involves other public officials, law makers, and public figures.[3]

STATEMENT OF FACTS

From the inception, the Government selected prejudicial aspects of this case and eagerly thrust them into the nightly news cycle, specifically targeting defendants Raymond Chow and Senator Yee. Media outlets immediately began inaccurately reporting that Mr. Chow was charged with murder for hire, trafficking guns, and narcotics distribution; and invariably referred to him as a gangster. Shortly thereafter, the Government repeatedly asserted, in open court as well as through multiple pleadings, that they possessed "multiple terabytes" of

1/ 18 U.S.C. § 1956(a)(3)(A), 18 U.S.C. § 1956(a)(1)(A)(I), and 18 U.S.C. § 1956(a)(1)(B)(I) – Money Laundering.
2/ 18 U.S.C. § 371 – Conspiracy.
3/ See generally United States' Motion for Protective Order pursuant to FED.R.CRIM.P. 16(D); docket 279.

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evidence against Mr. Chow and his co-defendants.

On April 10, 2014, the Government filed a Statement Re: Discovery to "suggest certain procedures upon which the parties may be able to agree," and asserting their justification for their request for a Protective Order.[4] After negotiations regarding said Protective Order were entered into, all parties but Chow stipulated. Chow declined to sign the Protective Order primarily to protect his fundamental right to a fair trial. Apparently accepting the Government's assertions at face value, this Court signed and imposed the Order Re. Protective Order, denying Chow's request for oral argument on the issue.

Central to the Government's rationale for said Protective Order was that the discovery was too voluminous for the Government to cull out specific and necessary aspects for redaction. The Government stated on multiple occasions, both in court and through multiple pleadings, that the protected materials were "multiple terabytes", and that it would be a "Herculean task" for the Government to redact specific aspects. At one point prior to May 7, 2014, the Government represented to the then Discovery Coordinator, Blair Perilman, that the discovery was approximately eight terabytes, a majority of which was video.[5] The eight terabytes number was relayed to all defense teams. However, a review of the discovery provided thus far indicates that the Government's assertions were grossly misstated. The totality of discovery turned over subject to the Protective Order equates to just over half a terabyte.[6] To

4/ Statement by USA; Docket 175.

5/ See email from Blair Perilman attached as Exhibit A.

6/ A terabyte is approximately 1,000 gigabytes. The Government's representation regarding the massive amount of

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date, despite efforts to contact the Government about the remaining discovery allegedly in their possession, defense counsel has not been made aware of the whereabouts of the remaining multiple terabytes of discovery that were the basis of the blanket Protective Order.

Beyond exercising his fundamental right to a fair trial, Mr. Chow's hesitation in signing the Protective Order was based on concerns that it failed to place restrictions on the Government regarding the safety and security in its handling of "Subject Material," if in fact it warranted protection. The proposed stipulation and subsequent order placed numerous housekeeping- and security-related responsibilities pertaining to the storage of "Subject Material" on defense counsel, yet inexplicably failed to impose a reciprocal duty on the Government. Accordingly, prior to the issuance of the Protective Order, defense counsel requested that the Protective Order be issued on reciprocal basis. At a discovery conference prior to the issuance of the Protective Order, Magistrate Spero rejected the notion of reciprocity without articulating justification. In Chow's Opposition to the Motion for Protective Order, the issue of reciprocity was again raised. The Government did not see any reason why it should be held to a reciprocal obligation to safeguard Protected Material. This Court agreed with the Government.

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discovery was misrepresented by approximately 1,500 to 7,500 gigabytes. This was not discovered by defense counsel until on or about June 6, 2014, after the Protective Order was originally litigated and the Order was issued.

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On or about May 19, 2014, subsequent to this Court's Order granting the Government's Motion for Protective Order, discovery available for defense was transferred to Colour Drop, a private printing company in San Francisco. Within six days of the issuance of the Order, Colour Drop was the victim of a burglary. Although Colour Drop was in the possession of protected "Subject Material"; at the time of the break-in, the police report reflects that little to no investigation was conducted.[7] Notably, from a reading of the incident report, the FBI failed to investigate the burglary. Perhaps most concerning, the staff from Colour Drop failed to inform the local police that, at the time of the burglary, they possessed critical evidence regarding this large scale political corruption and organized crime investigation. After a routine police inspection, it appears as though neither the local police nor the FBI obtained the video footage of the break-in from a neighboring business; rather, it was the media. Further, the burglary was not brought to defense counsel's attention until on or about May 29, 2014, ten days after the Protective Order was issued. To date, defense counsel has not been notified of any security procedures the Government has employed, or employs, to safeguard this critical "Subject Material" and defense has never been informed of any investigation beyond the superficial local police investigation.

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7/ See San Francisco Police Incident Report attached as Exhibit B.

ARGUMENT

I.

RECONSIDERATION OF THE NECESSITY OF THE PROTECTIVE ORDER IS WARRANTED HERE IN LIGHT OF NEW FACTS WHICH HAVE SURFACED IN THIS MATTER.

The Ninth Circuit has held that motions for reconsideration may be filed in criminal cases.[8] "[M]otions for reconsideration in criminal cases are governed by the rules that govern equivalent motions in civil proceedings." See *Hector*, 368 F. Supp. 2d at 1063, and *Fiorelli*, 337 F.3d at 286.

In ruling on motions for reconsideration in criminal cases, courts have relied on the standards governing Rule 59(e) and Rule 60(b) of the Federal Rules of Civil Procedure. See *id.* (applying the standard governing Rule 60(b)); *Hector*, 368 F. Supp. 2d at 1063 (analyzing a reconsideration motion as a Rule 59(e) motion).

Federal Rule of Criminal Procedure 57(b), "Procedure When There is No Controlling Law," states in relevant part, "A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district." Rule 59(e) of the Federal Rules of Civil Procedure authorizes motions to alter or amend a judgment. Such motions "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to entry of

8/ See *United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003)("As noted by the Second and Ninth Circuits, motions for reconsideration may be filed in criminal cases"); *United States v. Martin*, 226 F.3d 1042, 1047 n.7 (9th Cir. 2000) ("As the Second Circuit noted . . . , post-judgment motions for reconsideration may be filed in criminal cases").

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judgment." 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995).

A "district court enjoys considerable discretion in granting or denying" a Rule 59(e) motion. *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir.1999)(quoting Federal Practice and Procedure § 2810.1). See also *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001)("denial of a motion for reconsideration is reviewed only for an abuse of discretion"). A Rule 59(e) motion may be granted on any of four grounds: (1) a manifest error of law or fact upon which the judgment is based; (2) newly discovered or previously unavailable evidence; (3) manifest injustice; and (4) an intervening change in controlling law. *McDowell*, 197 F.3d at 1255 n.1 (quoting Federal Practice and Procedure § 2810.1).

Rule 60(b) of the Federal Rules of Civil Procedure permits relief from final judgments, orders, or proceedings. Such a motion may be granted on any one of six grounds: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

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Fed.R.Civ.P. 60(b). Like motions brought under Rule 59(e), Rule 60(b) motions are committed to the discretion of the trial court. *Barber v. Haw.*, 42 F.3d 1185, 1198 (9th Cir. 1994) ("Motions for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) are addressed to the sound discretion of the district court.").

Here, feasibility of redaction was the main thrust of the Government and Court's concern in issuing the Protective Order. The Protective Order in this case should be reconsidered because there was both an error and misrepresentation made to the court about the actual size of discovery-bearing on feasibility of redaction. Chow concedes that this Court was forced to balance various interests in granting the Order. However, the information given to the court about the size of data was nothing less than fiction. There is a direct correlation between the size of data in question and whether redaction is feasible, or whether a blanket Protective Order was even necessary. There is a dramatic difference between a half terabyte and multiple terabytes/thousands of gigabytes.

The Government stated in its pleadings and on the record at several hearings that they wished to turn over "multiple terabytes"[9] but that the task was too overwhelming due in large part to the size being impossible to extract specific portions for redaction. The Government's Motion for Protective Order states that "[p]arsing out and redacting [Protected Materials] would be an enormous, time-consuming and expensive task."[10] The

9/ Government's Motion for Protective Order, page 3, line 11; Docket 279.

10/ Government's Motion for Protective Order, page 3, line 26; Docket 279.

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Government had also informed Blair Perlman, the Discovery Coordinator, that approximately 60% of the Protected Material is video.[11] The Government stated "[i]t would be a Herculean task, if not impossible, to extract such comments and references from the rest of the discovery materials."[12]

Assuming *arguendo* it is not, in fact, practical for the Government to redact video, and assuming *arguendo* that this Court would still grant a Protective Order on audio and video, the Government would be left with merely a few hundred gigabytes of scanned documents to redact. If it is accurate that the Government has 10,000 pages of documents to turn over, this is highly practical as 10,000 pages of documents amounts to slightly more than one Banker's box of documents. This is an amount typical to an average size typical felony investigation and far from a "Herculean task." A handful of minimally trained staff could perform these redactions in days, and in fact, significant redactions are already reflected in the discovery even though the Government said it would be impractical. Thus, the Court was misled and led to believe the task was impossible when, given the resources at the Government's disposal, it was completely reasonable and could have been accomplished in days.

This Court stated, "*Given the volume of sensitive material* and the fact that it is so enmeshed with non-sensitive material, the Protective Order . . . is both practical and appropriate."(emphasis added)[13] Of particular importance, in a

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11/ See Exhibit B.

12/ Government's Motion for Protective Order, Page 4, lines 4-6; Docket 279.

13/ See Order granting Motion for Protective Order, page 3, lines 9-11; Docket 301.

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footnote on page 3 of this Court's Order, is this Court's citation to the Government's Motion, stating that "The Government represents that approximately 10,000 pages of reports and two 1 terabyte hard drives . . ." had already been turned over. The Government failed to inform the court that even though the data was stored on two hard drives, it barely totaled more than half a terabyte. Thus, counsel reasonably infers that the Court was misled by the Government's proffer and relied on the amount of data in issuing its Order.

Portraying this evidence as "multiple terabytes" is a blatant, gross, and irresponsible misrepresentation to this Court by the Government. What we know now is that the totality of evidence which the Government turned over, pursuant to the Protective Order, was slightly more than half a terabyte, most of which was video and would account for a majority of the data. In addition to contravening the expectation that Government prosecutors would be candid with the Court, this deception led to an overly burdensome Protective Order concealing non-sensitive materials on false pretenses, for which this Court cannot be faulted, but because of which this Court should reconsider. If the Court is not willing to abolish the Protective Order outright, it should, at the very least, grant oral argument so that an honest dialogue can occur regarding discovery and what should and should not be protected. This hearing is especially important since the Government has misled the Discovery Coordinator (characterizing amount of data as eight terabytes).

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II.

THE BREAK-IN AT COLOUR DROP ILLUSTRATES THE VULNERABILITY OF DISCOVERY AND ALSO THE LACK OF CARE UTILIZED BY THE GOVERNMENT; THUS IF THIS COURT FINDS A PROTECTIVE ORDER STILL NECESSARY, RECIPROCITY MUST BE ORDERED.

The Colour Drop break-in was foreseeable in a case of this nature and clearly shows why reciprocity in any Protective Order in this matter is crucial — especially with a Protective Order that unilaterally imposes security protocol on defense counsel such as that issued by this Court. Reciprocity was not addressed by the United States Attorney until after Mr. Chow raised and challenged the issue in his Opposition.[14] In their Reply, the United States Attorney proffered the following grounds in support of not imposing reciprocal obligations on the United States: (1) it makes no sense; (2) it was rejected by Judge Spero; (3) the United States already possesses all of the discovery materials in question, has not leaked them to the media or anyone else, and does not intend to do so in the future; and (4) the only documents that have been made publicly available in this case at this point are judicial records.[15]

Thus far, the Court has failed to provide guidance as to why Mr. Chow's request for reciprocity was denied, which Chow contends is a violation of Due Process and is an impermissible one-sided restraint on Chow's First Amendment Rights. In granting the United States Attorney's Motion for the Protective Order, by way of footnote 6 on page 5 of the Order, the Court merely stated the following: "Judge Spero correctly rejected

14/ See generally Memorandum in Opposistion; Docket 292.
15/ See Reply to Response, page 6, lines 16-24; Docket 299.

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this notion in the parties' negotiations. The government is already in possession of the materials in question." Neither the Government nor the magistrate have articulated an actual basis for non-reciprocity.

The break-in at Colour Drop illustrates the vulnerability of discovery and also the lack of care utilized by the Government. The Government turned over sensitive data to a private contractor with presumably no security protocol. This is evidenced by the police report which makes no mention that the Colour Drop employee informed the San Francisco Police Department of the sensitive nature of the discovery in its possession.

The responsible protocol surrounding this break in (or any break-in) would be to immediately inform police that the FBI should investigate the break-in since the break-in could have been in furtherance of political corruption. The FBI should have obtained security camera footage from neighboring businesses before the media was able to. The FBI should have checked entry points for DNA and fingerprints. The FBI should have contacted neighboring businesses for witnesses. The FBI should have checked cars in the area. Colour Drop staff should have been interviewed.

There is a stark lack of concern on the part of the Government about this break-in. It does not stand to reason that they would be so concerned about this discovery as to move to impede every defendant's rights by way of a blanket Protective Order, yet take no special care in their own handling of the data. This is why Mr. Chow asks this Court to make all

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aspects of the Protective Order reciprocal.

This is a unique Protective Order because it not only dictates what can be shared with the public and media, but most relevant to this argument, dictates security protocol on defense. The responsibility of the prosecutor as a representative of the public surely encompasses a duty to protect the societal interest in an open trial. But this responsibility also requires him to be sensitive to the due process rights of a defendant in receiving a fair trial. *A fortiori*, the trial judge has the same dual obligation. Impeding defense unilaterally without justification is unwarranted and is an erosion of Due Process.

Most importantly, if the Government and this Court felt the Subject Materials were so sensitive that it required a burdensome blanket Protective Order, then it should have taken responsible measures to ensure government compliance with the spirit of the Order. Anything less sends the message that it is acceptable to burden defense with protective measures but that the information is not so important as to require the Government to be even slightly competent in their handling of these valuable materials. There cannot be an adequate justification for imposing security measures on defense counsel but not imposing equal security measures on the Government. Imposing security obligations on defense and refusing to impose equal obligations on the Government is simply bad precedent.

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CONCLUSION

The United States Attorney's Office has an obligation to be truthful and accurate in all matters, especially in matters regarding political corruption which affect San Francisco's ability to self-govern through democratic process. The United States is aware of this obligation as illustrated by the following quotation posted on their website:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[16]

Failing to evaluate exactly how much discovery is at issue before moving for a Protective Order, thereby depriving the public of the right to know important information about governing officials, is the epitome of striking a foul blow because it led all the defense teams to believe the Government had more evidence than it actually had. This was a ploy to encourage witnesses to cooperate from the outset by intimidating defendants through exaggerating the amount of evidence against them. Even giving the Government the benefit of the doubt on the issue, it reflects incompetence.

Prosecutors in the Northern District are establishing an alarming trend in abusing Protective Orders. It is an attempt

16/ http://www.justice.gov/usao/dc/about/about.html quoting *Berger v. United States*, 295 U.S. 78, 88 (1935).

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to shift workload to defendants with less resources, but this is also part of a larger policy shift toward using the media and social media to deal devastating blows to the accused while at the same time restricting the accused of their rights to disseminate information. In a case such as this, and in other cases in this District, such should not be tolerated by this Court. The time has come for the United States Attorneys to be accountable for what they say in court. The time has come for this Court to take appropriate action to rectify what has essentially become a procedural trajectory that harms the public. It is well established tht in a Totalitarian government only the Government has access to the press.

In the modern day, if representatives of the Government are to be permitted to conflate, misstate, and outright mislead judges and defendants, then the American public suffers considerable harm. In a time where United States Attorneys nationwide have been found to have been misleading judges[17] regarding search warrants, electronic surveillance, and other activities, this misrepresentation about the amount of data in the Government's possession is critical and should not be brushed aside.

For the foregoing reasons, Mr. Chow requests this Court alter the Protective Order to align with reality. Chow requests that any Protective Order be revoked, or in the alternative, that the Protective Order be reciprocal in that the Government be held accountable for their security protocol regarding Protected Materials.

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20/ See Exhibit C-I, an article from Electronic Frontier Foundation regarding federal prosecutors misleading judges.

DATED: July 24, 2014

Respectfully Submitted,

/s/CURTIS L. BRIGGS

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AFFIDAVIT OF CURTIS L. BRIGGS

I, CURTIS L. BRIGGS, declare:

I am an attorney licensed to practice in the State of California and the Northern District of California, and the attorney of record for defendant herein, Kwok Chow. The statements in the accompanying MOTION OF RECONSIDERATION OF PROTECTIVE ORDER are true and correct to the best of my knowledge, based on my information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed July 24, 2014, at San Francisco, California.

Curtis L. Briggs

CURTIS L. BRIGGS